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No. 286

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

PETER DiFRONZO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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1. The Government suggests that implied agreement on the part of Petitioner Di Fronzo's trial counsel to the separation of the jury can be inferred from the failure of counsel to renew his express objection, made a few hours earlier, at the time when the trial judge re-affirmed his previously stated intention to allow the jury to separate. The Government at least recognizes that counsel

for Di Fronzo did expressly object to the trial judge's announced intention to permit the jury to separate for the night. To this extent it corrects the false impression created by the decision of the Court of Appeals for the Seventh Circuit that "* * * the trial court counsel for each of the defendants agreed to the procedure outlined and followed by the trial judge * * *" (Opinion, Appendix 1, p. App. 2) The Government, however, advocates a new theory which would make it the duty of defense counsel to protect his record by obdurately making and renewing his objections at every opportunity. That theory of procedure has been universally and uniformly rejected. In *Salt Lake City* v. *Smith,* 104 Fed 457, 470 (8th Cir. 1900), the court said:

> "* * * When a question has once been fairly presented to the trial court, argued, and decided, * * * it is neither desirable nor seemly for counsel to continually repeat their objections * * * *"

And see *Sanchez* v. *United States,* 293 F. 2d 260 (8th Cir. 1961). The trial judge in the instant case was cognizant of this rule of procedure and, on at least one occasion, sharply enforced it and properly rebuked counsel for renewing an objection where no occasion for the renewal existed. (See *e.g.,* Rec. 1187) Obviously, the trial judge did not want counsel to re-state their objections where no good reason existed for their so doing, and to suggest that counsel for Di Fronzo "impliedly agreed" by failing to re-state or renew an objection fully made and ruled upon at the first instance not only ignores well established precedents but invites counsel to seek the rebuke of the trial judge.

The Government next suggests that some weight be given the fact that the point herein was raised in a supplemental brief in the Court of Appeals. This argument

ignores completely, however, the fact that the objection was timely made in the trial court, that a ruling was made thereon, and that the Court of Appeals considered the assignment of error. Whatever reason appellate counsel in the Court of Appeals may have had for not including the point in his original brief, has no bearing on whether Petitioner can be deemed to have "agreed" to the procedure in the trial court. Petitioner, through his trial counsel, expressly objected to the procedure; the trial judge felt that the procedure was proper. The Court of Appeals did not weigh the fact that Petitioner had made his claim in a supplemental brief; it incorrectly ruled that Petitioner had agreed to the procedure. No great amount of perception is required to see that the Government places little faith in this appraisal.

Next the Government argues that *D'Antonio* can be distinguished from the instant case on its facts and refers to the facts that there the trial court failed to admonish the jury and that a marshal communicated with the jury. From this interpretation the government reads *D'Antonio* as resulting from a combination of the foregoing factors. But the record in *D'Antonio* was silent as to what, if anything, the marshal had said to the jurors, or whether anyone else had said anything to them. All that the record did indicate was that the trial judge had instructed the marshal to deliver a cautionary instruction to the jury. *United States* v. *D'Antonio,* 342 F. 2d 667, 668. From this it must be assumed that no actual prejudice was shown, and that the Court of Appeals did not consider any evidence of actual prejudice in arriving at its decision. *D'Antonio* should be read as holding that marshals and others will not communicate with the jurors and that cautionary instructions will not be required

where the trial court adheres to the historical right of a defendant "to have his case decided by a jury whose secret *deliberations* are not interrupted by the court's order permitting them to *separate* before a verdict has been reached." *United States* v. *D'Antonio,* 342 F. 2d 667, 669. Certainly the court's statement that: "All of these *possibilities* could be avoided by handling everything according to time-honored practices," (Emphasis added; *United States* v. *D'Antonio,* 342 F. 2d 667, 668), can have no other meaning. And, as argued in our Petition, the rule adopted by the Seventh Circuit admits of the existence of these "possibilities" and forbids separation as a prophylactic devise. D'Antonio did not show actual prejudice; he complained of a situation fraught with danger—danger that "Dispersement into the city at night of a group of men and women who have been deliberating in the security of the courthouse [would subject] them to the risk of being individually importuned, if not threatened, by telephone calls or personal contacts." *United States* v. *D'Antonio,* 342 F. 2d 667, 670. Similarly, the Petitioner here shows a situation fraught with the same danger and asks application of the identical prophylactic devise for the identical reason that such devise was applied in *D'Antonio.*

Finally, the Government would discard the *D'Antonio* rule and have this Court deny Certiorari on the basis that the question of separation is within the sound discretion of the trial court. In support of this argument the Government cites cases, all of which were considered, distinguished and rejected by the Court of Appeals in *D'Antonio. United States* v. *D'Antonio,* 342 F.2d 667, 669-70. *Holt* v. *United States,* 218 U.S. 245, and *Wheeler* v. *United States,* 165 F. 2d 225, involved separations during trial, not during deliberations. In *Brown* v. *United States,* 99 F. 2d 131, counsel for the defendant agreed to the separation. In *Kleven* v. *United States,* 240 F. 2d 270,

counsel failed to object to the failure to admonish when separation was permitted, thus not only failing to preserve the point regarding the failure to admonish for review, but stopping short of the issue whether separation during deliberation could be permitted. In *Lucas* v. *United States,* 275 Fed. 405, the court was unable to provide quarters to accommodate the jurors, so other forces prevented the application of the rule against separation.

The decision of the Seventh Circuit in D'Antonio points with clarity to the compelling reasons for a rule proscribing separation. Contrary to the Government's assertion, the decision was not based upon special facts, it was based upon the very real possibility of prejudice. That same possibility, by definition, existed in the present case, and the Petitioner objected, as clearly and certainly as he could, to any procedure which would deny him protection against the possibility.

2. In answer to the Petitioner's claim that his conviction constituted a denial of due process because of the absence of any evidence to sustain that conviction, the Government has asserted that Petitioner's conviction was justified because he was identified as one of three persons who occupied a 1961 Pontiac automobile while it followed a truck, loaded with stolen merchandise, in interstate commerce. (Brief for the United States in Opposition, pp. 4, 17) The Government reaches the conclusion that Di Fronzo was one of the occupants of the Pontiac at the time while it was following the truck because of its conviction that "One of the persons got out of the car and drove the remaining truck with stolen merchandise aboard to an Illinois town and abandoned it." (Brief for the United States in Opposition, p. 17) There is no controversy over the fact that Petitioner Di Fronzo was the person who drove the truck to Stone Park, Illinois, and

abandoned it. Petitioner, however, contests the adequacy of the record as showing that he got out of the Pontiac before driving the truck to Stone Park, Illinois. The Government's insistence that the record adequately discloses this raises new issues which should be decided by the Court as a complement to the point raised herein by Petitioner.

Di Fronzo was not identified by any Government witness as having been in the Pontiac at the time it was following the truck driven by Daddino to Wisconsin. Agent James H. Thompson of the F.B.I., who was observing the Calzavara farm, did not see the Pontiac return to the farm from its trip to Wisconsin Tuesday morning, May 2. (App. 17-18) Consequently, he did not see anyone get out of the Pontiac, or get out of the Pontiac and into the truck which was eventually driven to Stone Park, Illinois. Nor did any Government witness testify as to any fact that would permit an inference that Di Fronzo was in the Pontiac in Wisconsin.

At the conclusion of the Government's case, Petitioner Di Fronzo moved the court for a judgment of acquittal. (App. 43) Counsel for Di Fronzo argued the motion, (Rec. 1423-1434), and the court announced, in overruling the motion, that there was sufficient evidence to submit the case to the jury because they could infer guilt from the proven facts that Di Fronzo had been seen in the Pontiac on May 1st[1]. (Rec. 1428) Thereafter the defendant Calzavara

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[1] The Government says, (Brief for the United States in Opposition, p. 3), that "About 8:00 p.m. on May 1, 1961 petitioner DiFronzo took the 1961 Pontiac to a rendezvous with a tractor-trailer unit rented earlier that day by co-defendant Daddino in Chicago and followed it back to the Calzavara farm (J.A. 15, 19, 32-33, 36, 38)." While Daddino rented the tractor-trailer, it was allegedly John Torello, eventually acquitted by direction of the trial court, who was in the truck at the time in question (App. 19).

took the stand in his own defense. During his cross examination the following took place:

* * *

By Mr. Bailey:

Q. How many individuals were in the Pontiac [when it arrived at the Calzavara farm at approximately 5:30 A.M. on May 2, 1961]?

A. If I recall there were three.

Q. Now, did one of the individuals in the Pontiac get out and drive—to drive the truck?

A. Yes.

* * *

Q. And the one individual who got out of the Pontiac got into the truck, right?

A. Right.

Q. Did that truck leave at that time?

A. I don't know what time it was. I left and it went west on—

* * *

(Rec. 1647)

From this testimony the Government concludes that Di Fronzo was an occupant of the Pontiac while it followed the truck driven by Daddino in Wisconsin. (Brief for United States in Opposition, p. 17)

The Government, as a result, is not seeking, as indeed it cannot seek, to sustain the verdict of the jury or the judgment of the Court of Appeals for the Seventh Circuit on the basis of evidence introduced by the Government in the Government's case. The Government's Brief contains the *sub-silencio* admission that the evidence introduced by it was not sufficient, for to support its claim that the evidence was sufficient to support the conviction the Government has and must refer to the evidence elicited from Calzavara on his cross examination. The

Petitioner, however, in the trial court, challenged the sufficiency of the Government''s evidence by a motion for judgment of acquittal, (Rule 29, Federal Rules of Criminal Procedure, 18 U.S.C.) At that time it was the function of the trial judge to determine if there were evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If there were no such evidence it was the duty of the judge to grant the motion. *Cooper* v. *United States,* 218 F.2d 39 (D.C. Cir. 1954). Similarly, the Petitioner challenged the denial of his motion for a judgment of acquittal in the court of appeals. That court's decision does not indicate whether its judgment was based upon the testimony of Calzavara.

Calzavara's choice to testify after the denial of DiFronzo's motion for judgment of acquittal at the close of the Government's case does not operate as a waiver by Petitioner of his motion.[1] See, *Cephus* v. *United States,* 324 F.2d 893, (D.C. Cir. 1963) The Petitioner did not testify, and the only testimony which he offered was that of F.B.I. Agent Malone who was recalled by Petitioner to testify that he had not recorded in a report which he made on May 4, 1961, the fact that he had seen Petitioner in a Pontiac on May 1, 1961, at 8:00 P.M.[2] (Abst. 58) Under the circumstances such action

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[1] In fact, petitioner moved before trial (Supp. App. DiFronzo, p. 15), and after Calzavara's testimony, (App. 62) for a separate trial.

[2] The trial court, in the exercise of its discretion, refused to permit counsel for DiFronzo to recall Agent Malone for further cross examination on this point during the Government's case. (Rec. 1178)

could hardly be deemed a "waiver" of the motion for acquittal at the close of the Government's case. See, *Cephus* v. *United States,* 324 F.2d 893. In any event, Petitioner renewed his motion for judgment of acquittal at the close of all of the evidence. (App. 62) Such a motion preserves the validity of the court's ruling on the first motion for acquittal. Cf. *Hemphill* v. *United States,* 112 F. 2d 505 (9th Cir. 1940), reversed, 312 U.S. 657, 61 S. Ct. 729.

By referring to and relying on Calzavara's testimony to sustain the judgment—and only that testimony supplies any link between Petitioner and interstate activities, the Government has created a further issue to be decided by the Court: Where a defendant relies upon the insufficiency of the Government's case and does not essentially introduce evidence of his own, may a judgment of conviction be sustained solely on the basis of evidence offered by another defendant in his own defense? We submit that an affirmative answer will destroy the concept of an an adversary system of trials and convert the traditional concept that the prosecution must prove a defendant guilty beyond all reasonable doubt into a jungle where the defendant has not only to defend himself from the prosecution but from his co-indictees as well. The convenience of joinder of defendants does not admit of such drastic consequences. See, *DeLuna* v. *United States,* 308 F.2d 140 (5th Cir. 1962).

CONCLUSION.

For the above and foregoing reasons, it is respectfully prayed that a writ of Certiorari issue from this Court to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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